

Litigation under the *Proceeds of Crime Act 2002*

A defence perspective

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A. Introduction

1. Since the Australian Federal Police (AFP) took over the prosecution of the *Proceeds of Crime Act 2002* (POCA) from the Commonwealth Director of Public Prosecutions on 1 January 2012 (following the establishment of the Criminal Assets Confiscation Taskforce¹), there has, unsurprisingly, been a significant increase in litigation under the POCA.
2. The POCA is a complex piece of legislation, spanning approximately 350 pages. It contains strict limitation periods which, if not observed, can result in property being irretrievably forfeited to the Commonwealth without compensation. Its operation has commonly been described by the judges as draconian.²
3. Having regard to the fact that the stakes in litigation under the POCA are often high (since it commonly involves the risk of forfeiture of valuable real estate, vehicles and money), practitioners intending to conduct litigation under the POCA must have an understanding of the provisions by which property can be sought to be freed from restraint and the rigid timeframes which apply to the making of any applications.³

¹ A taskforce led by the AFP and utilising the resources from the Australian Crime Commission and the Australian Taxation Office, which specifically targets wealth derived through organized crime.

² For example, see *Tan v DPP (Cth)* 2004 NSWSC 952, [8].

³ On several occasions I have been briefed to defend professional negligence claims against solicitors who failed to observe the limitations periods under confiscation legislation, resulting in forfeiture of restrained property. By being familiar with the limitations periods under the POCA, such situations can be avoided.

4. Before embarking on an overview of some of the cornerstone provisions of the POCA, it is worth noting that litigation under the POCA is civil litigation; not criminal litigation. That is significant from a professional indemnity insurance perspective. Many practitioners practicing in criminal law do not hold insurance for civil work. If practitioners do not hold the necessary insurance, they ought not take instructions to act in POCA matters, but rather refer the relevant client to another suitably experienced and qualified practitioner.⁴
5. This paper is intended to provide practitioners with an overview of the types of restraining orders that may be made under the POCA and, more importantly, the steps that can be taken in an effort to protect clients' assets from forfeiture.

B. Types of restraining orders

6. There are five types of restraining orders that may be made under the POCA:
 - a. *Section 17* – a restraining order on the basis of a person having been charged with⁵ or convicted of an indictable offence.
 - b. *Section 18* – a restraining order on the basis that there are reasonable grounds to suspect that a person has committed a serious offence (but not requiring any person to be charged).
 - c. *Section 19* – a restraining order on the basis that there are reasonable grounds to suspect that property is the proceeds of certain specified offences or an instrument of a serious offence (but not requiring any person to be charged).
 - d. *Section 20* – a restraining order on the basis that there are reasonable grounds to suspect that a person has committed an indictable offence (whether in Australia or in a foreign country) and derived literary

⁴ A list of Melbourne based solicitors with experience in POCA litigation can be viewed at www.confiscation.com.au. If you wish to have your firm's name added to this list (particularly for some other cities around Australia), please let me know.

⁵ It is also possible to apply for such an order if charges are proposed.

proceeds from the commission of such offences (but not requiring any person to be charged);

- e. *Section 20A* – a restraining order on the basis that there are reasonable grounds to suspect that a person has unexplained wealth; where total wealth exceeds lawfully acquired wealth (but not requiring any person to be charged).
7. To date, there is only a single reported instance of a restraining order under section 20 (literary proceeds).⁶ Further, to date no restraining order has been made under section 20A (unexplained wealth). For that reason, these two types of restraining orders are not further addressed in this paper.
 8. However, restraining orders under sections 17, 18 and 19 are commonly applied for and granted. The resultant applications seeking to prevent forfeiture give rise to the bulk of the litigation under the POCA. With that in mind, it is now necessary to consider the steps that can be taken to seek to protect property which is the subject of a restraining order.

C. Revocation applications

9. A person whose property has been restrained can apply to have the restraining order revoked by making application under s.42 of the POCA. Having regard to the fact that restraining orders are almost always obtained *ex parte*, a revocation application is the vehicle by which an *inter partes* rehearing of a restraining order application can be brought on.⁷
10. An application for revocation must be made within 28 days after the making of the restraining order has been notified. An extension of time can be granted to make the application, but must be applied for within the 28-day period. If these

⁶ One example of a literary proceeds restraining order involves the publication of a book "*My Story – SCHAPELLE CORBY with Kathryn Bonella*"; see *DPP (Cth) v Corby* (2007) 170 A Crim R 282.

⁷ It has not yet been determined whether the right to have a restraining order application *inter partes* exists outside of the revocation application regime, as would ordinarily be the case in any *ex parte* civil injunction. For a discussion of that issue, see *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319. Such a rehearing application could have one significant strategic advantage, namely that the burden of proof would remain with the AFP, rather than shift to the applicant for the revocation application.

time frames are not complied with, the opportunity to seek revocation will be lost.

11. The Court may only revoke a restraining order if there are no grounds for making a restraining order at the time that the application for the restraining order is heard or it is otherwise in the interests of justice to do so. Any party may adduce evidence⁸ for the purpose of the revocation.
12. There are very few revocation applications in practice. That is not surprising. The threshold for obtaining a restraining order is low. Insofar as restraining orders rely upon a *reasonable suspicion* as to a certain state of affairs (relevantly, restraining orders under sections 18, 19, 20 and 20A), Weinberg JA stated in *McMunn v DPP*⁹ that “suspicion is a state of mind that falls well short of believe, as the High Court made clear in *George v Rockett*.¹⁰” In many cases, it is very difficult to demonstrate that there are no reasonable grounds for a suspicion. In those cases, it is best to focus on the various exclusion tests, which provide a different basis for freeing assets from restraint and in respect of which the standard of proof is the balance of probabilities.¹¹
13. As for the further ground for revocation, namely that it is “*otherwise in the interests of justice*”, that ground is yet to be tested. The POCA was amended to overcome the difficulties arising from the High Court’s decision in *International Finance Trust Co Ltd v New South Wales Crime Commission*¹², which resulted in the NSW confiscation scheme being declared constitutionally invalid. The sort of situation that may give rise to the setting aside of a restraining order under the “*otherwise in the interests of justice*” ground may be:
 - a. disproportionality between the suspected offending and the assets restrained;
 - b. misstatements in the ex parte restraining order application affidavit;

⁸ And the AFP may adduce evidence in addition to that adduced at the time the restraining order was made.

⁹ [2010] VSCA 330.

¹⁰ (1990) 170 CLR 104.

¹¹ POCA, s.317(2).

¹² (2009) 240 CLR 319.

- c. the use of documents in compiling evidence in support of a restraining order application which the AFP was not entitled to use for that purpose.

D. Exclusion from restraining order – s.31

14. A person whose property has been restrained can apply to have the property excluded from the restraining order under s.31 of the POCA. The relevant exclusion test is set out in s.29 of the POCA. The matters that an applicant must prove depend on whether the restraining order has been made under section 17, 18 or 19. The relevant tests are summarised below.
15. For a restraining order made under section 17:
 - a. if the offence to which the restraining order relates is a serious offence, that the interest is neither proceeds nor an instrument of unlawful activity;
 - b. if the offence to which the restraining order relates is not a serious offence (i.e. some lesser offence), that the interest is neither proceeds nor an instrument of the offence, or any offence, to which the order relates.
16. For a restraining order made under section 18:
 - a. that the interest is not proceeds of unlawful activity;
 - b. if an offence to which the restraining order relates is a serious offence, that the interest is not an instrument of any serious offence.
17. For a restraining order made under section 19:
 - a. that the interest is not proceeds of certain specified indictable offences;
 - b. if an offence to which the restraining order relates is a serious offence, that the interest is not an instrument of any serious offence.
18. In addition, section 29(3) provides a further opportunity for exclusion where the relevant offence is a serious offence or an offence under certain provisions of the *Financial Transaction Reports Act 1988* or the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* and the applicant can demonstrate each of the following:

- a. there are no reasonable grounds to suspect that the interest is proceeds of the offence, or any of the offences;
 - b. there is a suspect in relation to the order, but he or she has not been convicted of, or charged with, the offence, or any of the offences;
 - c. the conduct in question was not for the purpose of, in preparation for, or in contemplation of, any other relevant offence;
 - d. the interest could not have been covered by a restraining order if none of the offences had been serious offences.
19. Despite the above, no exclusion order may be made under section 31 at all in respect of a section 17 or section 18 restraining order unless the court is satisfied that no pecuniary penalty order or literary proceeds order could be made against the applicant.

E. Exclusion from forfeiture or compensation under Part 2-2 - s.74 and s.78

20. In the case of restraining orders made under section 18 or 19 (which do not require a conviction) and no conviction is relied upon by the AFP, the AFP will seek a forfeiture order under section 59 of the POCA.
21. A person whose property has been restrained and who faces such a forfeiture application can make two types of applications to seek to avoid the consequences of forfeiture, namely:
- a. an application for exclusion from forfeiture under section 74, which requires the applicant to demonstrate that:
 - i. the interest in the property is neither proceeds of unlawful activity;
 - ii. if an offence to which the restraining order relates is a serious offence, that the interest is not an instrument of any serious offence;
 - b. an application for compensation under section 78, which requires the applicant to demonstrate that:

- i. a proportion of the value of the applicant's interest was not derived or realised, directly or indirectly, from the commission of any offence; and
 - ii. that the applicant's interest is not an instrument of any offence.
22. As a matter of practice, it is common to make both of these applications concurrently; the section 78 application acting as a backstop to the section 74 application. The key difference between these two types of application are that the section 74 application leads to an "all or nothing" result, whereas the section 78 application can lead to a compensation payment in an amount equal to the value of the asset that can be traced to lawful acquisition.
23. Neither application can succeed where property is an instrument (i.e. property used in connection with the offending, as opposed to property which is derived from offending).

F. Exclusion from forfeiture or compensation under Part 2-3 - sections 94 and 94A

24. If a restraining order has been made under section 17 or section 18 and a person is convicted of a "serious offence", any property which remains restrained 6 months after conviction is automatically forfeited unless excluded from forfeiture.
25. A person who claims an interest in such restrained property can make two types of applications to seek to avoid the consequences of automatic forfeiture, namely:
 - a. an application for exclusion from forfeiture under section 94, which requires the applicant to demonstrate that:
 - i. the interest in the property is neither proceeds nor an instrument of unlawful activity; and
 - ii. the interest was lawfully acquired;

- b. an application for compensation under section 94A, which requires the applicant to demonstrate that:
 - i. a proportion of the value of the applicant's interest was not derived or realised, directly or indirectly, from the commission of any offence; and
 - ii. that the applicant's interest is not an instrument of any offence.
26. Again, applications under section 94 and section 94A are commonly made concurrently.
27. Since the 6-month time period is often insufficient to have the applications heard and determined, application can be made under section 93 to extend the period up to a maximum of 15 months from the date of conviction. The application must, however, be made within the 6-month period following conviction. Such extension application should be made in almost all cases having regard to the time it can take to get to hearing and the risk that a hearing may be adjourned to a later date.

G. Current issues

28. Despite the fact that the POCA has been enacted for over a decade, it raises many questions which are yet to be resolved by the Courts. Some of the matters which are likely to raise controversy are set out below:
- a. Proceeds; does proportionality have a role to play in the definition of proceeds? Property that is wholly or partly derived or realised, whether directly or indirectly, from the commission of an offence constitutes "proceeds". What if \$1 from tax avoidance is put towards a mortgage repayment; is it intended that the entire real estate be considered proceeds? A discussion of these issues can be found in *Gregory John Blake and Another*.¹³

¹³ (1992) 60 A Crim R at 257.

- b. Cuckoo smurfing;¹⁴ what is the effect of the POCA provisions on innocent victims of cuckoo smurfing? Specifically, can the innocent victims demonstrate that their interest in restrained assets was not acquired with proceeds of crime?
- c. Reasons; is a Court, when making an *ex parte* restraining order, obliged to give reasons? There are a number of authorities which suggest that reasons ought to be given, but yet it is rare to see this occur other than in NSW: see *New South Wales Crime Commission v Meads* [2010] NSWSC 1145; *New South Wales Crime Commission v Richards* [2010] NSWSC 1399; *New South Wales Crime Commission v Younan* [2012] NSWSC 13; *New South Wales Crime Commission v Pham* [2014] NSWSC 998.
- d. Use of documents obtained under warrant; can documents obtained by the AFP (or other law enforcement agencies) pursuant to a search warrant (for the purpose of prosecuting crime) be used in evidence in support of applications for restraining orders (being civil proceedings). The AFP commonly takes that approach. There are good grounds to argue that it is not permissible; see *Flori v Commissioner of Police & Anor*.¹⁵

¹⁴ The Australian Transactions Reports and Analysis Centre describes cuckoo smurfing as follows: *The term 'cuckoo smurfing' originated in Europe because of similarities between this typology and the activities of the cuckoo bird. Cuckoo birds lay their eggs in the nests of other species of birds which then unwittingly take care of the eggs believing them to be their own. In a similar manner, the perpetrators of this money laundering typology seek to transfer wealth through the bank accounts of innocent third parties. There are four key steps in this process:*

Step 1

A legitimate customer deposits funds with an alternative remitter in a foreign country for transfer into another customer's Australian bank account. This is a legitimate activity and is often a cheaper and faster alternative to using a mainstream bank.

Step 2

Unbeknown to the customer, the alternative remitter is part of a wider criminal syndicate involved in laundering illicit funds. This criminal remitter, while remaining in the foreign country, provides details of the transfers, including the amount of funds, to a criminal based in Australia. This includes the account details of the intended recipient in Australia.

Step 3

The Australian criminal deposits illicit cash profits from Australian crime syndicates into the bank account of the customer awaiting the overseas transfer. The cash is usually deposited in small amounts to avoid detection under transaction threshold reporting requirements. After an account balance check, the customer believes that the overseas transfer has been completed as legitimately arranged.

Step 4

The Australian criminal travels overseas and accesses the legitimate money that was initially deposited with the alternative remitter. The illicit funds have now been successfully laundered - the criminal owes nothing but a commission to the money launderer for their work.

¹⁵ [2014] QSC 284.

e. Trustee applications; to what extent can a trustee exclude property from a restraining order, having regard to the fact that the trustee does not hold the beneficial interest and can only exclude their “interest”? Does it mean that beneficiaries who are beneficially entitled to restrained trust property must make their own applications for exclusion?

29. There are an endless number of further issues that require clarification.

H. Practical hints when taking instructions

30. Having outlined some of the critical provisions of the POCA, it is now useful to consider the matters which practitioners ought to consider when taking instructions from clients in POCA matters.

31. Client - Determine whether your client is the accused/suspect or a third party. This is important because:

- a. different exclusion tests may be relevant;
- b. to determine if there are any conflicts of interests.

32. Identify all interest holders – Each person with an interest in restrained property must take their own steps to have it excluded (or otherwise released) from restraint. That is so because an applicant for an exclusion order can only exclude their own individual interest. Hence, the starting point is to identify the persons who have an interest in the restrained property, including the specific interest held by them (whether legal or equitable).

33. Identify the type of restraining order – Different restraining orders result in different risks of automatic forfeiture. Automatic forfeiture can occur under a section 17 or section 18 restraining order if the accused has been convicted. *De facto*¹⁶ automatic forfeiture can occur without conviction after a section 18 or section 19 restraining order has been on foot for 6 months and the AFP has made an application for forfeiture.

¹⁶ Although not strictly part of the automatic forfeiture regime, since the burden on the AFP in a forfeiture application under section 59 of the POCA (see also sections 47 and 49) is low, such forfeiture can also be operated much like automatic forfeiture.

34. Date of conviction - Determine whether there has been a “conviction” within the meaning of the POCA which, relevantly, means the date the finding of guilt is made or sentence passed; POCA section 331. The 6-month time for automatic forfeiture under a section 17 or section 18 restraining order runs from the date of conviction.
35. Police affidavit - Obtain a copy of the affidavit in support of the application for the restraining order (with all exhibits). It is required to be served with the restraining order. This will set out the evidential basis for the restraining order.
36. Living/business expenses - Consider whether it is necessary to make application for variation of the restraining order for reasonable living and business expenses (including the expenses of a dependant); POCA section 39. Note that variations are not permitted to release money for payment of legal fees in respect of proceedings under the POCA or criminal charges; POCA, section 24(2)(ca).
37. Applications for revocation, exclusion, compensation etc. - File any necessary applications within the required time limits. Relevantly:
- a. Revocation application – within 28 days of service of the restraining order;
 - b. Where a forfeiture application is made by the AFP under section 59 – prior¹⁷ to the hearing of the forfeiture application;
 - c. Where a person has been convicted and a section 17 or section 18 restraining order is on foot – prior to the period of 6 months from conviction.¹⁸
38. Stay of applications - Consider whether it is preferable to have any exclusion application heard before the criminal charges are determined, or whether the application ought be stayed pending the outcome of the criminal prosecution. Note that, when acting for a defendant, it may not be possible to exclude

¹⁷ Any application should be filed well prior to avoid any adverse cost consequences.

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property until after the criminal charges are determined and it is known whether a pecuniary penalty order or compensation or restitution order will need to be satisfied. In light of the decision of the High Court in *Commissioner of the AFP v Zhao* [2015] HCA 5, it is likely that a stay will be granted where there is an overlap of issues arising in the criminal trial and the POCA litigation.

39. Undertaking as to damages - Consider whether the undertaking as to damages contained in the restraining order is sufficiently broad to protect all persons who may suffer damage as a result of the restraining order. The undertaking as to damages is the only basis upon which a claim can be made against the AFP/Commonwealth arising from loss suffered by reason of the restraining order; see *McCleary v DPP (Cth)*.¹⁹
40. Sale of property/mortgage payments - Consider whether restrained property should be sold pending the hearing of the exclusion application; POCA, section 39. The AFP will generally consent to a sale provided that the net proceeds of sale are held by the Official Trustee pending the finalisation of the proceedings under the POCA. If a sale is contemplated, a variation of the restraining order is required.
41. Evidence - Consider what documents will be required to support any application for exclusion, such as bank statements, sale of land contracts, loan applications, tax assessment notices etc. These may take some time to collate.

About the author

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For more information about proceeds of crime litigation in Australia visit www.confiscation.com.au

¹⁹ (1998) 20 WAR 288; (1998) 157 ALR 301.